SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 293

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A CORPORATION,

Petitioner,

vs.

UNITED CASUALTY COMPANY, A CORPORATION, CRAFTSMAN INSURANCE COMPANY, A CORPORATION, AND HAROLD P. LACROIX,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Prior Opinion Herein.

The judgments of the Trial Court are found at pages 33 and 35 of the Record. The memorandum opinion of the Trial Court is found at pages 36 to 38 of the Record. The opinion of the Court of Appeals appears at pages 44 to 51 of the Record. It is reported at 142 Fed. (2d) 390.

II.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, becoming Section 347 (2), Title 28, U. S. Code.

2. Date of the judgment in the Trial Court is June 11, 1943 (R. 35). An appeal was duly perfected to the Circuit Court of Appeals for the First Circuit and the opinion of that Court is dated April 21, 1944 (R. 44).

3. A stay of mandate until further order of the Court was entered on the 5th day of May, A. D. 1944 (R. 52).

4. An order extending time within which to file Petition for writ of Certiorari to and including August 17, 1944, was signed by Mr. Justice Rutledge on July 3, 1944 (R. 52).

III.

Statement of Case.

We supplement, as concisely as possible, the statement of issues as set forth in the Petition for Writ.

United Casualty Company was losing money on its hospital expense policies and ceded all of that type of insurance to the plaintiff, effective July 1, 1940. At that time it paid to the plaintiff full unearned premiums on policies still in force on July 1, 1940 (R. 17). For example, if the premium on a policy had been paid on January 1, 1940 to cover a year's premium, the United Casualty paid one-half of that amount to the plaintiff which would cover the remaining period for which the premium was paid, from July 1, 1940. But the United Casualty Company retained all of the premium covering that portion of the time prior to July 1, 1940. On the effective date of the reinsurance contract there were many policy-

holders with claims pending and unpaid, and others who had claims incurred (having become sick or hurt), but who had not yet reported their claims. Plaintiff agreed in the reinsurance contract to pay all policy claims (R. 17). The payment of claims incurred after July 1, 1940 was the plaintiff's own responsibility as it had received the premium to cover the risk after July 1, 1940. This was the unearned premium as of that date. But the payment of claims incurred prior to July 1, 1940, was also a liability assumed by the plaintiff insofar as the policyholders were concerned. So the United Casualty Company in the agreement promised to pay plaintiff an "adequate reserve" to cover "all claims" (R. 17). The amount actually paid on such a claim was to be the actual reserve on that claim (R. 19). If the policyholder had become sick or hurt prior to July 1, 1940, the claim was to be taken as having been incurred before July 1, 1940, even though the hospital confinement did not occur until after that date (R. 19). That is very clear in the agreement. *The reinsured policies provided that claims were payable upon proof of loss. The proofs of loss always showed the date of hospital confinement. There never was and never could be any dispute about that date. But in the proofs of loss facts were elicited from which the date the accident occurred or the sickness became apparent (in all cases, including pregnancy) could be ascertained as to each claim that was paid. It is common knowledge that opinions may differ about when or on what date a given illness first originates or becomes apparent. The claimant and the attending physician sometimes give different versions in the proofs of loss. That is when the questions or disputes as to incurred dates would arise.* If there were a dispute as to the incurred date, i.e., the date on which the policyholder first became sick or hurt, *each claim* was to be considered on its merits, and the Insurance Department Examiner

was to settle the controversy thereon between the United Casualty Company and the plaintiff. A formula for resolving the dispute was laid down in the reinsurance treaty (R. 19).

The Examiner did settle all disputes according to the formula except for approximately 1050 claims. It happens that all of these were claims for hospitalization on account of pregnancy. As a matter of fact, and as a matter of record (see the answer of the Insurance Department Examiner, page 32 of the Record) he refused to follow the formula and to consider "each claim" on its merits. He did not determine the incurred date by the date the sickness first became apparent. He substituted his own rule and said that the incurred date was the date of entry into the hospital (R. 32).

A reinsurance treaty is involved. The reinsurer (plaintiff) did not buy the business. It was paid to take over the business and assume the liability. The payment was to cover the liabilities assumed by the reinsurer (an "adequate reserve"). No margin for profit was included, but the reserve to cover unearned premiums and incurred claims was to be "adequate" for the purposes of the reinsurance agreement. The agreement so stipulated (R. 17). After the execution of the agreement the United Casualty Company transferred its remaining or other health and accident business, and all of its assets, to the Craftsman Insurance Company. But the "adequate reserve" promised plaintiff under the reinsurance agreement was to constitute a lien until reimbursement to plaintiff for the payment of "all claims" where the incurred date was prior to July 1, 1940 (R. 18). The reason for this was that the plaintiff had not received any premium or unearned premium to cover any period of coverage or risk prior to July 1, 1940. Such premiums had been previously remitted by the policyholders to the defendant United Casualty Com-

pany and have been retained in their entirety for the period prior to July 1, 1940 by said company or its successor defendant Craftsman, at all times unto this date.

IV.

Specification of Errors.

The Court of Appeals for the First Circuit erred in that

1. It held that a Declaratory Judgment proceedings would not lie to determine a dispute involving an "adequate reserve" under an agreement providing for such reserve, where the parties disagreed and where a neutral appointed by the agreement admits that he did not follow its formula for determining the dispute.

2. It held that the actions of a "neutral" were not judicially reviewable where said acts failed to follow the terms of submission which he was bound to follow under the law of the state wherein the agreement was executed.

3. It held that an arbitrator or referee created by an agreement to perform certain duties under a formula laid down in said agreement who admits in his answer to a petition for a Declaratory Judgment review, that he did not follow such formula, is clothed, as a matter of law, with such power and authority that his acts were binding upon the parties and not subject to judicial review.

V.

Summary of Argument.

POINT A.

(Specification 1)

The terms of the reinsurance treaty whereby the plaintiff was liable for claims unpaid on July 1, 1940, the date of the agreement, when the incurred date of such claims

was prior to that date, coupled with the provision of the reinsurance treaty calling for an "adequate reserve" to be paid to plaintiff, and a formula for fixing the same, required the "neutral" to calculate the "adequate reserve" in accordance with said formula. His failure to do so required a judicial review of his acts and a determination of the dispute. A petition for Declaratory Judgment was the means provided by law to obtain such a judicial review and determination. It was error for the Court to deny it.

POINT B.

(Specification 2)

The law of Massachusetts where the contract was executed required a "referee" or "arbitrator" or "neutral" to follow the terms of submission of the agreement which created him. The District Court and the Court of Appeals should have applied the law of Massachusetts.

POINT C.

(Specification 3.)

The answer of the "neutral" (R. 32) in which he alleges in effect that he "took all maternity cases as a whole and ruled that the incurred date on all such cases where hospitalization did not occur prior to July 1, 1940 was the date of entry into the hospital" was contrary to the condition of submission. This allegation required the District Court to review his acts with a view of determining whether or not in taking such action he had complied with the formula or terms of submission contained in the reinsurance agreement, to-wit: "Each claim will be considered on its merits and will be taken to have been incurred prior to July 1, 1940, if the insured's accident occurred prior to that date or if his sickness first became apparent prior to that date." The

action taken by the "neutral" as alleged in his answer constituted a violation of that portion of the formula which required him to take "each claim on its merits" and to fix the incurred date as the date the sickness became apparent.

VI.

ARGUMENT.

Point A.

(Specification 1.)

The parties, being unable to agree on an "adequate reserve" under the terms of the reinsurance agreement, were involved in a controversy within the meaning of the Federal Declaratory Judgment Act. (Act. of June 14, 1934, 48 Statutes at Large 955, Chapt. 512, Judicial Code. Paragraph 274(d) 28 U. S. C. A. paragraph 400.) The fact that the agreement referred such disputes to an arbitrator or neutral did not solve this controversy nor eliminate it. The neutral by his own pleadings found on page 32 of the Record had not followed the condition of submission. Therefore, his acts, or rather his failure to act, constituted a nullity. The position of the parties, so far as the existence of a justiciable controversy was concerned, remained the same as if no provision for an arbitrator or neutral had been contained in the agreement.

Mr. Chief Justice Hughes in *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 57 Sup. Ct. Rep. 461, 81 L. Ed. 617, 108 A. L. R. 1000, said:

> "Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the

> rights of the litigant may not require the award of process or the payment of damages." 81 L. Ed. 622, 300 U. S. 241-43.

Further in the opinion of this case the same Court said,

> "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy', manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in a constitutional sense. The word 'actual' is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense, the Congress is acting within its delegated power over the jurisdiction of the Federal Courts which the Congress is authorized to establish. Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends." 300 U. S. 239-41, 81 L. Ed. 621.

Following the construction of the Declaratory Judgment Act in the *Aetna Life* case, *Supra*, this Court held in *Maryland Casualty Company* v. *Pacific Coal & Oil Company*, 312 U. S. 270, 61 Sup. Ct. Rep. 510, 85 L. Ed. 826 that where an actual controversy exists, and the other jurisdictional requirements are found, an action for review by Declaratory Judgment will lie. And in *Brillhart* v. *Excess Insurance Company of America*, 121 F. (2d) 776, the Circuit Court of Appeals for the Tenth Circuit reversed a holding by the District Court dismissing a petition for Declaratory

Judgment involving a reinsurance agreement. The majority opinion of this Court reversed the holding of the Court of Appeals because of the effect of a proceedings pending in the State Court. (Same case, 316 U. S. 491, 86 L. Ed. 1620, 62 Sup. Ct. Rep. 1173.) There are no State Court proceedings pending in the instant case. And there can be no question under the holdings of the national Courts, since the enactment of the Federal Declaratory Judgment Act, that the existence of a controversy in the case at Bar, with the existence of other jurisdictional elements, entitled plaintiff to a review under that Act. Further, that it was an abuse of discretion to refuse it. (*New York Life Ins. Co.* v. *Roe*, 102 Fed. (2d) 28, 123 A. L. R. 285.)

POINT B.

(Specification 2.)

Since the holding of this Court in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 it is mandatory that the United States District Courts and the United States Courts of Appeal follow the judicial law as well as the statutory law of the State, applicable.

The Massachusetts law required a judicial review of the "neutrals" acts. Over one hundred years ago the Massachusetts Supreme Court in *Boston Water Power Co.* v. *Gray*, 6 Met. 131, held that only where not restricted by the terms of submission an arbitrator has authority to decide questions of law and questions of fact as he sees fit, and the parties are bound by his findings. Briefly, in that case, during the course of a trial involving water rights under a contract providing for arbitration between the parties to a written agreement, plaintiff's counsel objected to the admission of any evidence to prove error in the award, on the ground that no error was admitted by the referees and that

it was not competent for the defendant to show by extrinsic evidence any error which they did not admit, and they contended that all the objections taken by the defendant excepting such as were founded on a supposed departure of the award from the submission were objections which could not be maintained unless by the aid of extrinsic evidence, and that the award did not vary from the submission. In discussing the rule on the review of the findings of an arbitrator on a submission or award, Chief Justice Shaw said:

> "It is amongst the rudiments of the law that a party cannot, when a judgment is relied on in support of the bar in action, avoid the effect of it by proving even if he could prove to perfect demonstration that there was a mistake of the facts or of the law. But this *general rule is to be taken with some exceptions or limitations arising either from the submission or from the award, itself,* or from matters distinct from either". (6 Met. at p. 166). (Italics ours.)

In a lengthy opinion the Court discusses the many exceptions to this rule and dwells upon the conditions of submission, saying:

> "Another ground for setting aside the award is a mistake of fact apparent upon the award itself." (6 Met. at p. 168.)

In *Estes* v. *Mansfield,* 6 Allen, 69, an action had been brought upon a promissory note signed by the plaintiff payable to one Charles Estes and endorsed to the plaintiff. After the commencement of the action the parties had submitted the case to arbitrators with a provision that their award should be in accordance with the law and evidence presented. The arbitrators' award was discussed by Chief Justice Bigelow in the opinion as follows:

> "The award is not a bar to the maintenance of this action. The authority of the arbitrators was expressly

limited by the terms of the submission to the making of an award 'in accordance with the law'. This, very clearly, they have not done. They have wholly omitted to pass on the essential fact in issue—whether the plaintiff was a bona fide holder of the note declared on for value before its maturity—on which the right of the defendant to resist payment of the note in the hands of the plaintiff entirely depended. Instead of finding this fact, they seemed to have assumed its existence; and in lieu of making a proper application of the rule of law to such fact, if proved, by making an award in favor of the plaintiff for the amount of note with interest, they have made an award in favor of the defendant leaving the plaintiff to seek a remedy, if any he has, against his endorser for transferring to him a note against which the promissor might have had a valid defense in a suit brought by the payee. This was manifestly a gross mistake of law which led the arbitrator to decide the case on a false issue. On well-settled principles the award is void. Boston Water Power Co. *vs.* Gray, 6 Met. 131, 167" (6 Allen, at p. 70).

This right of review of the findings of an arbitrator or neutral who has failed to follow the condition of submission or formula laid down in the agreement that created him has been adhered to by the Massachusetts State Courts down to the present date. In discussing the rule, the Massachusetts Supreme Judicial Court in *Fitzgerald Construction Co.* v. *Southbridge Etc. Co.* 304 Mass. 130, decided October 25, 1939, stated

"If the parties of their own accord and outside of Court saw fit to submit to arbitration, *without restriction or condition,* the whole matter in dispute, *including all questions* of *law and fact,* then the decision of the arbitrators upon the subject matter in the absence of fraud is binding and conclusive upon the parties, even though the arbitrators may have committed an error of law in reaching their conclusion" (304 Mass. at p. 134). (Italics ours.)

So in *Marsch* v. *Southern New England R. R. Corp.*, 230 Mass. 483, the Massachusetts Supreme Judicial Court repeated the rule as:

> "The general rule undoubtedly is that, *unless restricted by the agreement of submission,* arbitrators are the final judges of both law and fact and an award will not be reviewed or set aside for mistake in either." (2 R. C. L. p. 392, par. 36.)

And in *Doherty* v. *Phoenix Insurance Company,* 224 Mass. 310 the Court points out:

> "The referees were unhampered by any restrictions or conditions" (p. 315, 224 Mass. Rep.).

In another recent decision of the Massachusetts Supreme Judicial Court where the findings of the referee or arbitrator were set aside, we find the Court stating the Massachusetts rule to be:

> "That an agreement between an employer and employee that submission to arbitration of any controversy, claim or demand should be a condition precedent to a resort to an action at law or suit in equity, made the submission a condition precedent to a resort to the Courts, but not to the existence of a substantive cause of action." (*Lakube* v. *Cohen,* 304 Mass. 156.)

In *Patton* v. *Babson Statistical Corp.,* 259 Mass. 424 the same Court was called upon to construe the following provision in a contract:

> "If any question arises as to the interpretation or application of any feature of the plan, the decision of the President shall be final."

The Massachusetts Supreme Judicial Court held that this provision in the agreement did not prevent a Court from reviewing the agreement and holding that the clause quoted did not bar a recovery contrary to the decision appealed from.

First Circuit Court of Appeals Formerly Followed the Rule!

The Court of Appeals for the First Circuit, as late as May 8, 1941, followed the Massachusetts rule. In the case of *B. Fernandez & Hnos, S En C.*, v. *Rickert Rice Mills, Inc.*, 119 Fed. (2d) 809, the First Circuit Court of Appeals said:

> "It is now well settled that the question of the construction of a contract to determine what questions the parties thereto agreed to submit to arbitration is one for the court to decide and not for the arbitrators. (* * * the court here cites numerous authorities).
>
> "To allow the arbitrators conclusively to decide what questions were submitted to arbitration is to allow them finally to determine the extent of their own jurisdiction. If the parties intended that the arbitrators should have the power finally to decide what was to be submitted to them, there is no objection to their doing so, but the courts do not readily *infer* such an agreement." (Italics ours.) (119 Fed. (2d) at p. 814.)

The following appears in the Syllabus of said case:

> "1. The construction of a sales contract to determine what questions the parties thereto agreed to submit to arbitration is one for the Court to decide and not for the arbitrator.
>
> "2. Where there is a conflict between a clause of contract providing for arbitration and one providing for a conclusive certificate, it is the duty of the Court to attempt to reconcile both clauses.
>
> "3. Contract providing for arbitration will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.
>
> "4. A party is never required to submit to arbitration any question which he has not agreed so to submit." (119 Fed. (2d) 809, syllabus).

Even prior to *Erie R. R.* v. *Tompkins, supra,* the First Circuit Court of Appeals in construing a Massachusetts

contract held that an appeal would lie upon the findings of an arbitrator who had failed to follow the rules of submission. (*Gammino* v. *Inhabitants of the Town of Dedham*, 164 Fed. 593.) We shall discuss this case under our argument on Specification #3.

POINT C.

(Specification 3.)

With respect to this specification, we respectfully solicit the Court's consideration of the following decision by the United States Circuit Court of Appeals for the First Circuit: It is *Gammino* v. *Inhabitants of the Town of Dedham*, 164 Fed. 593. Here a contract had been made for the construction of a sewer in the Town of Dedham, Massachusetts, and contained the following provisions:

> "In case of any dispute arising the engineer shall have the right to settle the same, and he shall have the right to determine and interpret the meaning of these specifications and contract to be made under them, and all decisions of the engineer shall be final." (164 Fed. at p. 600). (Note the broad authority conferred upon the arbitrator.)

An important provision of the contract read:

> "The above quantities are not guaranteed, and the commissioners reserve the right to increase or diminish the same within 25%. Upon the quantities above given bids will be compared. These quantities will be a part of any contract made for the prosecution of this work, and when referred to in such contract, include each and every part of the same." (164 Fed. at p. 594.) (The "adequate reserve" for "all claims" clause in reinsurance agreement involved here)

In ruling on this case the Court said:

> "We are of the opinion that, upon a construction of the contract which gives due effect to this provision, the

prices named are to prevail only to the extent of the quantities named, with a 25 per cent margin of variation. The contract fails to fix a price for quantities in excess of this. * * * The limitation to a 25% variation was inserted for a purpose. Except for this provision, the prices named would prevail for all the work done, even if it should turn out that the actual portion of earth and rock excavation were substantially different from what was contemplated. An attempt to hold a contractor strictly to the prices named for an amount of work substantially different from what was contemplated might result in hardship so great as to show mutual mistake concerning the subject matter of the contract and thus endanger the entire contract. * * * The auditor found that the sum total of earth and rock excavation did not exceed by 25% the sum total of the number of cubic yards stated in the estimate for earth and rock excavation, and, therefore, that the prices named in the contract applied to all rock excavation. Counsel for defendant in error contends that this is in accordance with the proper construction of the contract. We are of the opinion that this is erroneous and that it not only violates the terms of the contract, but leads to an unreasonable result" (164 Fed. at pp. 594, 595).

The allegation contained in the answer of the Insurance Department Examiner, stating that he "has taken all maternity cases as a whole" (R. 32) when it was provided in the reinsurance agreement that "each claim will be considered on its merits" (R. 19) constitutes a conclusive and uncontraverted showing in the record of this case that the arbitrator violated the condition of submission contained in the agreement. His additional allegation, "That in determining the amount of the claim reserve to be paid by the defendant United Casualty Company to the plaintiff, the defendant LaCroix determined the incurred date in all so-called maternity cases as the date of hospitalization of the insured, that is, the date when said insured entered the

hospital" (R. 32) in the face of the provision in the reinsurance agreement reading "each claim * * * will be taken to have been incurred prior to July 1, 1940 if the insured's * * * sickness first became apparent prior to that date" (R. 19), is a further, conclusive, and uncontroverted showing in the record of this case that the arbitrator did not follow the condition of submission contained in the agreement.

But the District Court and the Circuit Court of Appeals, in their opinions in this case, *infer* from the language of this reinsurance agreement, authority on the part of the arbitrator to set up his own formula in determining the incurred date of maternity or pregnancy claims. We use the word "infer" advisedly. There is nothing in the reinsurance agreement excluding any certain type of claim from the application of the formula. There is no exception contained in the agreement as to maternity or pregnancy claims.

However, the Circuit Court of Appeals in its opinion seems to agree with the arbitrator that a maternity or pregnancy claim is not a sickness claim within the meaning of the reinsurance agreement. "We may say that we are far from convinced that the arbitrator made any mistake in interpreting the contract. The word 'sickness' certainly does not necessarily include 'pregnancy'" (R. 50), 142 Fed. (2d) 394. In this connection we most emphatically and respectfully submit to this Court that where the reinsurance agreement involved uses the language "plus cash in an amount sufficient to constitute an *adequate reserve* to adjust and pay *all claims* under such policies incurred prior to July 1, 1940," (R. 17) and *"all such claims"* (R. 19) and *"each claim"* (R. 19) (italics ours) there can be no doubt whatsoever about the intention of the parties. They were talking about "all the claims" and "each claim." If it had been their intention to exclude any type of claim,

that intention would have been displayed in the contract by saying "except maternity or pregnancy claims." *The exclusion can not be inferred. Neither can it be inferred that the parties intended that the arbitrator set up a new condition of submission or formula for any certain type of claim, pregnancy or otherwise.* In the latest expression from this very Circuit Court of Appeals in *B. Fernandez & Hnos, S En C.*, v. *Rickert Rice Mills, Inc.*, 119 Fed. (2d) 809 (First Circuit), the Court said, "if the parties intended that the arbitrator should have the power finally to decide what was to be submitted to them, there is no objection to their doing so, but the Courts do not readily *infer* such an agreement" (italics ours). (119 Fed. (2d) 814.) In so holding the Court of Appeals for the First Circuit was following the Massachusetts Law as determined by decisions of Massachusetts State Courts for generations.

The Circuit Court of Appeals dismisses the suggestion that the Massachusetts statutes under which the policies involved were approved did not recognize "pregnancy or maternity" insurance coverage as such (R. 52). (142 Fed. (2d) 394.) The fact is, and we repeat it here, and quote the statute in the appendix hereof, the policies could only provide coverage for sickness or accidental injury under the Massachusetts law. The term "sickness," as used in the policies (insuring clause etc.), in the statutes *and in the reinsurance agreement* was an all inclusive term. It includes, in addition to diseases, benign tumors, pregnancies, normal or abnormal growths or any other condition causing hospitalization. The claims for benefits and the checks in payment thereof were under the sickness branch of insurance coverage. Anyway the prospective mothers felt they were sick and filed claims. The plaintiff paid—although defendants had received and retained the premiums covering the time the sickness began. The defend-

ants have not challenged the propriety of the payment to policyholders by plaintiff. They owe the plaintiff therefor under the agreement.

The Circuit Court of Appeals further rests its decision of affirmance upon a stipulation signed by one of plaintiff's attorneys and reading in part, "that the arbitrator did not exceed the authority conferred upon him but the plaintiff contends that the examiner misconstrued the provisions of the contract dealing with the incurred date of claims and that an adequate reserve was not set up for pregnancy claims" (R. 50) (142 Fed. 2nd 394). Of course, it is not contended by plaintiff that the arbitrator exceeded his authority when he considered pregnancy claims. He was required by the reinsurance agreement to consider them. He would have violated that agreement had he failed to do so. The fact that he did consider pregnancy claims is alleged in his answer. The fact that defendants urge such consideration and his conclusion as binding upon the plaintiff, shows that maternity claims were included under the terms of the reinsurance agreement, the same as any other sickness claims. There being no reference to maternity claims in the agreement, that was the only possible conclusion. However, any doubt about their inclusion is eliminated by the stipulation referred to. But this stipulation certainly can not be construed to mean that in the consideration of the claims, the arbitrator had followed the formula prescribed for him. Such a construction of the stipulation flys in the face of the pleadings and record in this case; particularly the allegations of the arbitrator himself (R. 32). Obviously the language of the stipulation indicated an intention to agree on the proposition that pregnancy claims were included in the reinsurance agreement (we say, as sickness claims) and that by considering these claims the arbitrator did not exceed his authority.

Finally the Circuit Court of Appeals rests its decision of affirmance upon the statement: "the actual reserve found by the arbitrator turned out to be very near this estimated figure, namely $50,412.96" (R. 51) 142 Fed. 2nd 394-5. In the first place there is nothing in the reinsurance agreement to indicate that the "estimated figure" was to approximate an "adequate reserve" (R. 17). With a volume of premiums paid in advance and with much coverage at risk during the period involved, it was not the intention of the parties that the so called "estimated reserve" have any relation to an "adequate reserve." There was no possible way of determining the number of policyholders who would file claims for a sickness incurred prior to July 1, 1940. The so called "estimated reserve" covered only those who had already given notice but who had not been paid. It had no bearing whatsoever on the "adequate reserve" called for by the reinsurance agreement (R. 17). The plaintiff did not agree to be bound by the "estimated figure" or by any maximum or minimum additional figure or percentage relating thereto. Here again please consider the holding in the *Gammino* case, *supra,* where a 25% variance is discussed. It was only after the reinsurance treaty had been in force and effect for many months that the plaintiff had any idea of the total amount paid on claims, the incurred date of which was prior to the effective date of the contract. *Whatever may be found to be the "adequate reserve" upon application of the formula to "all claims" as agreed upon by the parties, is the amount involved in this lawsuit.* That can not be determined until the formula has been applied to the pregnancy claims as called for by the agreement which referred to "all claims" and "each claim" (R. 17-19). The so called "estimated reserve" of $51,000.00 was the figure selected by the defendant United Casualty Company, based on the claims already reported. The plaintiff did not in-

vestigate it nor accept it or anything relating to it. On the contrary the plaintiff required this provision to be inserted in the agreement: "until the *actual amount* is determined *all assets* of the company shall be subject to a lien to secure the payment of *any difference* that may be found due the Association" (R. 18) (italics ours).

Conclusion.

No one knew or could know the amount or approximate amount of that "difference" until all policy claim liability had been discharged. It is admitted that the plaintiff has fulfilled its obligations to the policyholders and has paid all the claims. It is now entitled to a judicial review of the acts of the arbitrator, to produce a determination of the "adequate reserve." This is only in keeping with the language of the contract and pursuant to the precise purpose and rules of the Federal Declaratory Judgment Act.

Therefore, we most respectfully pray that the petition for writ of certiorari be granted in this case to the First Circuit Court of Appeals.

PHILIP E. HORAN,
GEORGE J. CLEARY,
V. J. SKUTT,
Counsel for Petitioner.